## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: April 12, 2002

TO : Richard L. Ahearn, Regional Director

Earl Ledford, Regional Attorney

Laura E. Atkinson, Assistant to Regional Director

Region 9

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice 512-5036-3311

SUBJECT: Littleford Day, Inc. 530-6050-1612-5000 530-6067-2060-7700

Case 9-CA-38993 530-6067-4033-6700

530-8054-1500 530-8054-9000

This case was submitted for advice as to whether the Employer's implementation of a discretionary merit wage program violated Section 8(a)(5) and (1) under the theory set forth in <u>Colorado-Ute Electrical Assn.</u> We conclude that a complaint is warranted, absent settlement.

## FACTS

The Employer and the Union have had a long-term collective-bargaining relationship. The parties have bargained for and included in contracts a merit wage increase program at least since 1994. The most recent contract, which expired on March 25, 2001, contained the following provision:

12.6 At the end of every four (4) month period during the term of this contract, the Company shall make a complete review of the service record of each employee for the express purpose of determining whether or not merit increases have been granted to all workers deserving thereof. Promptly thereafter, the Shop Committee will be supplied with a list showing the employees to whom raises have been granted as a result of the last review.

There is no evidence that the Union has ever objected to or grieved either the Employer's award of a merit increase or its failure to do so.

Both parties gave timely notice of their intent to terminate the contract and began bargaining for a new agreement on February 14, 2001. Despite nine bargaining sessions held between February 14 and May 8, the parties

 $<sup>^{1}</sup>$  295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10<sup>th</sup> Cir. 1991), cert. denied 504 U.S. 955 (1992).

were unable to reach agreement on a new contract. On May 8, the Employer presented its final offer. By letter dated May 15, the Employer announced it would implement its final offer effective May 21. The Employer thereafter implemented that offer, which contained a new wage scale and the following changes in the provision regarding merit increases:

12.6 \*\*\* After the conclusion of each six (6) month period during the term of this contract, the Company shall make a complete review of the \*\*\* performance record of each employee for the express purpose of determining whether or not merit increases \*\*\* should be granted to all workers deserving thereof. As a result of their reviews, employees may be reduced one level within their rate schedule during the term of this contract. Employees so reduced will be eligible for future increases should their performances merit an increase. Promptly thereafter, the Shop Committee will be supplied with a list showing the employees to whom merit increases have been granted or reductions made as a result of the\*\*\* reviews.<sup>2</sup>

The Union filed and then withdrew a surface bargaining charge in Case 9-CA-38440. The Union then filed a Section 8(a)(5) and (1) charge in Case 9-CA-38495 alleging that the Employer had unilaterally implemented its final offer in the absence of a bona fide impasse. The Region dismissed that charge; the Office of Appeals sustained that dismissal on October 29, 2001.

The Employer conducted performance reviews in October or early November but did not notify the Union concerning implementation of the merit increases, the criteria used for the reviews, or which employees were affected by the reviews. As a result of employee complaints, the Union learned in December that at least one employee had had his wages reduced one level as a consequence of his evaluation.

By letter dated November 28, the Union requested negotiations to discuss a number of matters unrelated to this charge. The Union and the Employer met on January 7, 2002, at which time the Union inquired about the pay decrease described above. The Employer agreed to submit a list of employees whose wages had been changed as a result of their evaluations. There has been no further discussion; the Union has not filed a grievance; and the Employer has stated that it would not arbitrate the issue because there

<sup>&</sup>lt;sup>2</sup> According to a draft of the Employer's proposal, language changes from the expired agreement are designated by asterisks and boldfaced underlined phrases.

is no contract in place, citing <a href="Indiana-Michigan Electric">Indiana-Michigan Electric</a> Co., 284 NLB 53 (1987).

## ACTION

We conclude that a Section 8(a)(5) and (1) complaint is warranted, absent settlement.

In Colorado-Ute, the Board concluded that an employer lawfully can insist to impasse on a merit pay proposal giving the employer unlimited discretion to determine merit wage increases and, after impasse, consider employees for merit wage increases based on criteria that had been proposed to, and adequately discussed with, the union.3 However, as clarified in subsequent cases, the Board concluded that because such a proposal for unlimited management discretion in determining merit wage increases required the union's waiver of its statutory rights under Section 8(a)(5), a bargaining impasse involving the system does not privilege the employer's unilateral exercise of its discretion in granting merit increases absent bargaining over the timing and criteria that would inform the Employer's discretion.<sup>4</sup> For example, in Colorado-Ute the Board found that the Employer was not privileged to apply its implemented merit wage system based on the following factors: (1) the proposal contained no minimums or maximums for merit increases; (2) the timing and amount of increases were to be determined solely by management; (3) the only criteria for merit increases were "individual performance" and "contribution on the job"; and (4) the proposal provided no role for the union in the initial determination of the timing and amounts of the merit increases, and also exempted management's decision from union or employee challenge through the contractual grievance procedure. 5

Subsequently, in <u>McClatchy Newspapers</u>, <sup>6</sup> the Board similarly found first, in disagreement with the administrative law judge, that the company did not violate Section 8(a)(5) by insisting to impasse on its merit wage

 $<sup>^{3}</sup>$  295 NLRB at 608, 610.

 $<sup>^4</sup>$  Id. at 608-610. See also <u>McClatchy Newspapers</u> (Sacramento <u>Bee)</u>, 321 NLRB 1386, 1390 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998).

 $<sup>^{5}</sup>$  295 NLRB at 609.

<sup>6 299</sup> NLRB 1045 (1990), enf. denied and remanded 964 F.2d 1153 (D.C. Cir. 1992), supplemented and affirmed by 321 NLRB 1386 (1998), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert denied 524 U.S. 937 (1998).

proposal as a condition of any agreement. However, the Board found the employer "still had a duty to bargain with the union about the timing and amounts of such increases prior to granting any such increases," and accordingly, its unilateral grants of merit increases violated Section 8(a)(5) and (1) of the Act.

Here, as in McClatchy, the Employer has implemented and applied to individual employees a merit pay program that has no limits on the amount of increases that can be given to individual employees. Nor are there criteria for determining which employees get increases, which get decreases, and which get no changes in their wages. Nor did the Employer bargain with the Union before applying the policy to unit employees.<sup>8</sup>

Our finding of a violation in this case is not inconsistent with the fact that the Employer's proposal included a schedule for employee evaluations to be performed once every six months. In McClatchy Newspapers (Modesto Bee), 9 the employer proposed, bargained to impasse over, and implemented a merit pay proposal that stated that any merit increases granted would be effective for the first full pay period following the evaluation. Nonetheless, the Board held, 322 NLRB at 813 fn. 4, that the implementation was nonetheless unlawful because of "the integrated nature of the procedure and criteria relevant to a merit pay proposal. . . and the limited, independent significance of the timing component in the context of the proposal."

Thus, the Employer violated Section 8(a)(5) and (1) when it unilaterally implemented its merit pay proposal $^{10}$  by evaluating and then reducing the pay of several employees.

<sup>7</sup> 299 NLRB at 1046.

 $<sup>^{8}</sup>$  Compare Monterey Newspapers, 334 NLRB No. 128 (2001), where the  $\overline{\text{Board held, slip op}}$ . at 4 fn. 11, that a successor employer was free, under NLRB v. Burns Security Services, 406 U.S. 272 (1972), to implement an initial discretionary wage scale for job applicants while having to bargain with the union about terms and conditions of employment for current employees because, in large part, the pay band under which the employer could award starting salaries was "tightly circumscribed".

<sup>&</sup>lt;sup>9</sup> 322 NLRB 812 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1998), cert. denied 524 U.S. 137 (1998).

 $<sup>^{10}</sup>$  See also KSM Industries, 336 NLRB No. 7, slip op. at 3 (2001), where the Board held that the employer violated

The fact that the Union did not request bargaining over the Employer's merit pay plan does not warrant a contrary conclusion. This is not a situation in which a union merely complained about an employer's unilateral change or filed an unfair labor practice charge without requesting bargaining about the change. <sup>11</sup> Instead, the Employer made clear that it had implemented its plan and that bargaining would not change its mind; thus, the Union was presented with a fait accompli excusing its failure to request bargaining. <sup>12</sup>

For all of the above reasons, a Section 8(a)(5) and (1) complaint is warranted, absent settlement.

B.J.K.

Section 8(a)(5) by unilaterally implementing a proposal that allowed it to "unilaterally change the [health care] provider, plan design, the level of benefit, and the administrator during the term of the contract so long as he change is companywide. . . . Moreover, although the proposal calls for discussions with the Union about interim changes, Administrative Manager. . . acknowledged that the Respondent did not intend to negotiate changes in the plan. He testified that the Respondent would have the last word."

<sup>&</sup>lt;sup>11</sup> See, e.g., <u>American Bus Lines</u>, 164 NLRB 1055 (1967).

<sup>12</sup> See, e.g., KSM Industries, 336 NLRB No. 7, slip op. at 3; Owens-Corning Fiberglas Corporation, 282 NLRB 609 (1987).